No. 88-1674

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In The

Supreme Court of the United States

October Term, 1988

WILLIAM JOSEPH HEALY, JR.,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Whether summary judgment was properly granted dismissing petitioner's complaint, in which he asserted that the termination from his position as Marketing Vice-President, Management and Training Division of New York Life Insurance Company ("New York Life" or "Company") was due to his age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

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No.

In The

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October Term, 1988

WILLIAM JOSEPH HEALY, JR.,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, William Joseph Healy, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 7, 1988, and reported at 860 F.2d 1209 (3rd Cir. 1988).

OPINION BELOW

The opinion of the Court of Appeals and the District Court of the District of New Jersey appear in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on November 7, 1988, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> "§ 623(a)(1)
>
> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age . . . "

STATEMENT OF THE CASE

This action was commenced with the filing of a Complaint and Jury Demand in the United States District Court for the District of New Jersey on October 22, 1986, alleging employment discrimination on the basis of age in violation of 29 U.S.C. § 621 *et seq.* It was dismissed by the District Court on motion for summary judgment. This judgment was affirmed by the Third Circuit, with a dissent.

Petitioner, age 57, was a twenty-three year employee of New York Life who, at the time of his termination, served in the capacity of Marketing Vice-President, Management and Training Division. This action arises out of New York Life's February 1986 decision to discharge petitioner and to concomitantly assign his job responsibilities to Paul Russell, age 47.

At the time of petitioner's discharge, he had acquired over twenty-three years of experience with the Company, beginning as an agent in 1963 and culminating with his appointment as Marketing Vice-President on July 1, 1984. Throughout Mr. Healy's long tenure with New York Life he was regularly promoted and assumed additional responsibilities in the areas of both agent and management training.

In December 1985, the Company alerted its employees that a 20% reduction of management personnel would be affectuated on February 25, 1986. The Voluntary Early Retirement Incentive for Management ("VERIM") offered those employees 55 years of age or older, with ten years or more of service, the option of choosing early retirement. Eligible employees were required to make their choices known to their department heads by January 31, 1986. However, if after that time, an individual department had not met the goal of a 20% reduction in management payroll, it would be necessary to involuntarily terminate certain mangement personnel. The plan benefits provided for a maximum of 1½ years full salary, full health and pension plan coverage, and other benefits. Employees who were involuntarily terminated received a less lucrative severance settlement. Mr. Healy did not chose to voluntarily resign.

All employees who were involuntarily terminated were informed of that decision on February 25, 1986.

On that day, Mr. Jerald Hinrichs, Senior Vice-President in

charge of the Agency Department, summoned Mr. Healy to his office and bluntly stated "You are terminated right now." (A217). The following discussion ensued:

> "And I said, why? What reason? And he said, 'we needed to get the 20-25% management salary liability reduction and you are part of it. Since Ed Hessa [MVP Agent Training] took the voluntary retirement, I have decided neither the Agent Training or Management Training Division will be headed up by a Marketing Vice-President, but rather will have an Assistant Vice-President report directly.' I asked the question 'does that mean that you are eliminating all Marketing Vice Presidents.' And he said, 'no, just you. This decision is not based on performance, its strictly a salary liability reduction'. "

Petitioner was then ushered out of Mr. Hinrichs' office to speak with an outplacement representative of the Company.

As a result of this involuntary termination, Mr. Healy received one year's salary of $65,600, pension benefits of approximately $15,000, health insurance for life, paid for by the Company, and a reduced amount of life insurance. For the first full year following his termination, Mr. Healy earned approximately $3,200.

Shortly after Mr. Hinrichs informed Mr. Healy of his termination, Mr. Walter Ubl, Vice-President, informed Mr. Paul Russell that affective March 1, 1986, he would assume all of Mr. Healy's previous responsibilities as Marketing Vice-President. In fact, his appointment to that position became official in September 1986. However, in the intervening months Mr. Russell served as "de facto Marketing Vice-President." Mr. Russell was questioned in this regard as follows:

"Q. After Mr. Healy left New York Life, did you assume additional responsibilities until your official appointment as Marketing Vice-President?

A. Yes . . . just so I'm clarified from the time that Bill Healy left and the time I was appointed Marketing Vice-President, is that your question?

Q. . . . the time frame would be March 1 of 1986 to September 1, 1986.

A. Yes, I did . . . Those responsibilities were the overall responsibilities of the Management Training Division.

Q. You had nothing to do with agent training, it was just Management Training Division.

A. That's correct.

Q. Did anybody officially tell you as March 1 of 1986 that these were going to be your responsibilities . . . ?

A. Yes . . . both Walter Ubl and Jerry Hinrichs."

It is notable that Mr. Hinrichs' dual contentions that Mr. Healy's termination was based on "salary considerations" and resulted from a management decision to re-organize the Marketing Department, and have the Assistant Vice-Presidents report directly to the Vice-President, are simply pretextual. Mr. Russell, in fact, acted as Marketing Vice-President, performed all of petitioner's job duties, and when officially named to the position in August 1986, was given a salary which exceeded that paid to petitioner

by $7,000.

Mr. Russell's testimony revealed that his responsibilities were identical to petitioner's. Mr. Russell evaluated and selected the courses and systems to be incorporated into the regional and home office training schools. He dealt with the same outside vendors with whom Mr. Healy enjoyed a previous, longstanding relationship. He was ultimately accountable for generating the course material utilized for all management training.

At times Mr. Russell delegates responsibility and at times he takes direct control of a given task. One of his "principal accountabilities" is to "assure that people working for him have a positive work environment." He accomplishes this by "allowing them to express themselves . . . allowing them to expand on that idea, hold them responsible and hold them accountable for their areas of responsibility."

It had always been Mr. Healy's philosophy to encourage the growth and creativity of those persons working for him. In fact, Mr. Healy viewed his job as Marketing Vice-President as one which he delegated responsibility and "let people run with new ideas."

At no time did petitioner state that Mr. Russell failed to perform his job in anything but a competent fashion. Indeed, in 1985, Mr. Healy gave him an overall rating of "2" and positively commented upon his "initiative and self-starting ability." Contrary to New York Life's contentions, however, the position of Marketing Vice-President was certainly not eliminated; even if the agent and management training divisions were combined, Healy's twenty-three years of experience with the Company, during which time he was actively involved in both agent and management training, until these divisions were severed in 1983, certainly attest to his expertise in these areas; his consistently positive evaluations belie any notion that his termination was based on performance

when, in fact, he was never informed either verbally or in writing that his performance was in any manner unsatisfactory; and finally, the Company's claim that his termination was based as "salary considerations" fails since Mr. Russell's salary after February 1986 exceeded plaintiff's. Indeed, absent any direct job related explanation for Mr. Healy's termination, age was clearly a determining factor in the Company's decision to discharge him. The Company induced older employees to retire, and when there was a refusal, termination followed. In short, petitioner was more experienced and better qualified to perform the job duties given to Paul Russell. In this regard, Mr. Healy stated the following:

> "Q. . . . Do you think it's possible that Jerry Hinrichs and Walter Ubl did not think you were doing as good a job as you thought you were doing.
>
> A. They never indicated that to me in anyway . . .
>
> Q. Didn't they indicate it to you in at least one way that we can think of?
>
> A. And what is that?
>
> Q. By involuntary terminating.
>
> A. No, I think that had to do with my age . . . because I was very effective in what I was doing and what I was accomplishing. And so in looking at reasons, I think that could be the only reason.

REASONS FOR GRANTING THE WRIT

The decision below incorrectly granted summary judgment on a claim of age discrimination under the ADEA.

In 1986 the Supreme Court handed down the "summary judgment trilogy" of *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex v. Cartrett*, 477 U.S. 317 (1986), which dealt with standards for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The trilogy did not, however, deal with summary judgment standards in employment discrimination actions. After the trilogy was handed down, each circuit has published at least one opinion regarding an award of summary judgment on the merits of an employment discrimination claim. Some circuits see an expanded role for Rule 56 in light of the trilogy,[1] while others do not.[2] The Third Circuit,

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1. *Slaughter v. Allstate Insurance Co.*, 803 F. 857 (5th Cir. 1986) (conjectural testimony alone is insufficient to raise an issue as to the existence of a policy of replacing employees over age 40 with younger employees); *Menard v. First Security Service Corp.*, 46 Fair Empl. Prac. Case. (BNA) 1575 (1st Cir. 1988); *Goldberg v. Green Co.*, 836 F.2d 845 (4th Cir. 1988); *Friedal v. City of Madison*, 832 F.2d 965 (7th Cir. 1987); *Shah v. General Elec. Co.*, 816 F. 2d 264 (6th Cir. 1987); *Carey v. United States Postal Serv.*, 812 F.2d 621 (10th Cir. 1987).

2. *Paollini v. Dresser Industries, Inc.*, 821 F.2d 81 (2nd Cir. 1987) (fact issue over voluntariness of early retirement option made by employees precluded award of summary judgment in age discrimination case); *DeCintio v. Westchester County Medical Center*, 821 F.2d 111 (2d Cir. 1987); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363 (8th Cir. 1987); *Perez v. Curcio*, 841 F.2d 255 (9th Cir. 1988) (summary judgment to employer in age discrimination case challenging demotion and discharge reversed despite circuit court's acknowledgment that plaintiff's evidence was weak); *Garret v. City and County of San Francisco*, 818 F.2d 1515 (9th Cir. 1987); *Sparks v. Pilot Freight Carrier, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

for instance, has issued conflicting decisions in discrimination cases, thereby providing absolutely no guidance as to its standards.[3] These conflicts and the uncertainty which flows therefrom justify the granting of certiorari to review the judgment below.

In *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 663 (5th Cir. 1985), it was stated that:

> "In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent . . . Often motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder."

In an age discrimination claim in which the plaintiff is alleging disparate treatment and thereby automatically probing the employer's underlying motivation and intent, a jury trial is the only appropriate forum. In addition, as it is well settled, and the lower court readily admits, that an ADEA plaintiff can prevail through indirect evidence sufficient to raise an inference of discrimination, summary judgment is clearly inappropriate here.

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3. *Hawkins v. Temple Univ.*, 829 F.2d 437 (3rd Cir. 1987); *Jackson v. University of Pittsburgh*, 826 F.2d 230 (3rd Cir. 1987); *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3rd Cir. 1987); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3rd Cir. 1987) (evidence that employer's stated reason for discharge is not the true reason is sufficient to avoid summary judgment without more evidence of discriminatory intent); *See also Horbison-Walker Refactories v. Brieck*, No. 87-271 (3rd Cir. 1987), *cert. granted*, ____ U.S. ____ 108 S.Ct. 1218 (1988).

While it has been firmly established that the order of proof delineated in *McDonnell Douglas v. Green,* 411 U.S. 793 (1973), serves as the procedural and substantive undergirding of all Title VII litigation, in matters involving the ADEA, these standards only serve as procedural guideposts. *Moore v. Sears Roebuck & Co.,* 464 F.Supp. 357 (N.D. Ga. 1979).

> "In the case at bar, the Court is faced not with a pure replacement situation but with a situation akin to a reduction in force. In such circumstances courts have recognized that the *McDonnell Douglas* elements may not be entirely applicable and do not constitute an immutable definition of a prima facie case. Thus, in the case at bar, in order to prove a prima facie case, plaintiff should not be required to prove that he applied for but failed to receive a specific particular position but that he was qualified to assume but did not receive another position. *(Fugate v. Allied Corp.)* 582 F.Supp. 780, 783 (N.D. ILL. 1984)." *See also McCorstin v. United States Steel Corp.,* 621 F.2d 749, 754 (5th Cir. 1980).

Thornbrough also is instructive regarding the proper standards to be applied in reduction in force cases:

> "Reduction in force cases are obviously outside the membrane of *McDonnell Douglas* since reduction-case plaintiffs are simply laid off and thus incapable of proving the third *McDonnell Douglas* element, i.e.,-actual replacement by a younger employee. We, therefore, elaborated a different standard for reduction in force cases under which a plaintiff must (1) satisfy the standing requirements of the statute by showing that he is

> within the protected group and that he has been adversely affected-e.g., discharged or demoted by the employer's decisions; (2) show that he was qualified to assume another position at the time of the discharge or demotion; (3) produce evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reading the decision at issue." (cites omitted, *id.* at 642).

In order to withstand a motion for summary judgment, a plaintiff must only enunciate a prima facie case of discrimination, and present sufficient evidence indicating that a genuine issue of material fact exists. This was done here.

Lowe v. City of Morovia, 775 F.2d 998 (9th Cir. 1985), *modified,* 784 F.2d 1407 (9th Cir. 1986), explains the rationale for restricting summary disposition of claims when a prima facie case is established. This should be the governing standard. Plaintiff Lowe, a rejected applicant for employment with a municipal police department, filed a disparate treatment suit alleging that she was not hired because she is black. She also claimed that the city's use of a hiring eligibility list that automatically existed after six months, together with hiring of experienced police officers to fill entry level positions, had a disparate impact adverse to black applicants.

Plaintiff Lowe established a prima facie case on her disparate treatment claim by showing that she belongs to a class protected by Title VII, that the police department had an opening for an entry level officer, that she applied for the opening, and that the police department continued to accept applications for entry level positions after plaintiff applied. The city's articulated reason for not hiring Lowe was that no opening existed during the time plaintiff's name was on an effective eligibility list. The district

court accepted the city's explanation for not hiring Lowe and awarded summary judgment to the city upon a finding that there was insufficient evidence that plaintiff had been treated unfavorably because of her race.

The circuit court sustained summary judgment in favor of the city on Lowe's disparate impact race discrimination claim and her Title VII sex discrimination claim, but held that the district court erred in granting summary judgment on her disparate treatment race discrimination claim. In addition to acknowledging Lowe's testimony that the city's personnel manager informed her that the City of Monrovia had no women and no black police officers and that Lowe should apply to the Los Angeles police force because it was "begging for minorities and especially females," the Ninth Circuit stated that it is not appropriate to award summary judgment once a plaintiff has established a prima facie case.

> "Once a *prima facie* case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination. (citations omitted) . . . [W]hen a plaintiff has established a prima facie inference of disparate treatment or circumstantial evidence of the discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.' " (*Id.* at 1009).

The Ninth Circuit accordingly remanded Lowe's disparate

treatment race discrimination claim and her sex discrimination claim under 42 U.S.C. § 1983 for trial.

The view that a fact issue concerning pretextuality is sufficient to avoid summary judgment, even without evidence pertaining directly to discriminatory intent, is expressed by the Third Circuit's decision in *Chipollini v. Spencer Gifts,* 814 F.2d 893 (3rd Cir. 1987). Plaintiff, Anthony Chipollini, worked for Spencer Gifts as "construction manager" for about eleven years until 1982, when he was terminated as part of a reduction-inforce. Chipollini was fifty-eight years old at the time, and the responsibilities remaining from his job were reassigned to his forty-three year-old assistant. After his termination, Chipollini filed suit against Spencer Gifts under the Age Discrimination in Employment Act.

Deposition testimony indicated that Chipollini performed his job satisfactorily, but that his performance declined and that his attitude was "inflexible and uncooperative." Based on this testimony, along with an affidavit from the company president establishing the need for a reduction-in-force of construction management personnel, Spencer Gifts moved for summary judgment. In opposition to summary judgment, Chipollini submitted an affidavit disputing the performance and attitudinal problems described by Spencer Gifts, but he did not present additional evidence to support his claim that the reason for his termination was age. Because there was no direct evidence of discriminatory intent, the District Court granted Spencer Gifts' motion for summary judgment.

The Third Circuit reversed by contradicting the employer's articulated reason for including plaintiff in the reduction-in-force. The Circuit Court reasoned that a genuine issue of intent was raised:

"In the context of the summary judgment motion,

> however, the court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to the conclusion that the employer did not act for discriminatory reasons.
>
> * * *
>
> The plaintiff challenges the defendant's post-ligitation articulation of its intent and the documentary evidence can be viewed as supporting the plaintiff's challenge. Consequently, the issue of pretext turns on Spencer's credibility and does not appropriate resolution on a summary judgment motion." (*Id.* at 900-01).

The view that evidence contradicting the employer's stated non-discriminatory reason for the challenged employment practice raises a triable issue of discriminatory intent is not universally shared. In *Goldberg v. B. Green & Company, Inc.*, 836 F.2d 845 (4th Cir. 1988), the Fourth Circuit considered an award of summary judgment to the employer in an age discimnation case by a manager discharged for allegedly having an independent contractor performing repair work for the company build a doghouse for the manager at company expense. Plaintiff Barry Goldberg resisted summary judgment by showing that the Maryland Commission on Human Rights ruled in his favor on his charge of discrimination, based on evidence that he paid the contractor himself, and by contending that the employer's stated reason for firing him was implausible. This showing was insufficient in view of the Fourth Circuit because there was no evidence going directly to the issue of discriminatory intent.

> "While that type of evidence may tend to demonstrate that Green's termination of Goldberg was arbitrary, it does not reflect any intent to discriminate on the basis of age. Goldberg cannot avoid summary judgment in this case simply by refuting Green's non-age related reason for firing him." (*Id.* at 849).

The more stringent summary judgment standard is appropriate.

In the instant matter, petitioner has presented overwhelming evidence concerning his qualifications and experience. The Company, on the other hand, has attested to Mr. Russell's ability to competently steer a combined agent/management training division onto a steady, productive course and asserts that he possesses the qualities for this position. It is notable that New York Life never takes issue with Mr. Healy's experience and qualifications. Moreover, New York Life never directly or indirectly addresses plaintiff's assertions-which were corroborated by Mr. Russell himself-that the latter has been performing petitioner's identical job duties since February 1986.

> "The employer's articulation of an allegedly legitimate non-discriminatory reason for its action . . . lacked the requisite specificity to constitute such a valid reason. The employer's articulation thereof was that Mr. Hunigan lacked the 'qualities' needed to do the job which the employer need alone.
>
> What those 'qualities' which Mr. Hunigan suddenly lacked were was not made to appear, except that the employer contended that Mr. Gaddis possessed all of those qualities." (*Hunigan v. Intermountain Telephone Company,* 556

F.Supp. 240, 244, (E.D. Tenn. 1982).

Respondent rests its decision to replace petitioner upon a subjective business judgment couched in terms of an age-neutral management reduction program. However, assuming *arguendo* that defendant's VERIM program was indeed age neutral, the telltale question of whether *this* petitioner was discriminated against remains unanswered.

> "[T]he fact that a plaintiff's job duties were assumed by other employees of the same age does not logically preclude an inference of age discrimination in the decision as to which position to eliminate, at least so long as there was a reduction in staff rather than one for one replacement." (*Moore* at 363 fn. 6).

In the instant matter, the moving party must demonstrate that no material facts are in dispute. Furthermore:

> "The task of this Court when reviewing a grant for summary judgment is identical to that of a trial court. We must determine *de novo,* while viewing the evidence in the light most favorable to the appellant, whether Arcata [Defendant] has demonstrated the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law." (*Foster v. Arcata Associates, Inc.,* 772 F.2d 1453, 1459 (9th Cir. 1985). (*See also, Smith v. Farah Co. Inc.,* 650 F.2d 64, 68 (5th Cir. 1981).
>
> . . . the reviewing court must make an independent assessment of the allegations of discrimination, guided by the district court's determination of

subsidiary facts which are not themselves clearly erroneous)."

The ultimate burden of persuading the trier of fact on whether or not petitioner was the victim of age discrimination rests with the petitioner. At that time, however, he can meet that burden through the presentation of evidence "to discredit the employer's proffered reasons as to prove by indirect evidence that his age was a factor in the decision to dismiss him. Nonetheless, the burden of persuasion on summary judgment remains unalterably with Pennsylvania Drilling as movant." *Sorba v. Pennsylvania Drilling Co. Inc.*, 821 F.2d 200 (3rd Cir., 1987).

Mr. Healy has indeed presented sufficient credible evidence through which an inference of age discrimination can be drawn. This evidence, viewed in the light most favorable to him, raises genuine issues of material fact which precludes granting summary judgment.

Throughout his tenure with the Company, Mr. Healy received consistently positive performance evaluations.Furthermore, until the Company's 1983 severance of the Agent Training Division from its Management Training counterpart, Mr. Healy effectively carried out the job responsibilities indigenous to those departments. Upon his appointment as Marketing Vice-President, his superior evaluations did not waiver. He was repeatedly commended for his unflagging dedication to the Company and the energy with which he consistently carried his division's projects to fruition. Furthermore, during the same month that Mr. Healy was so abruptly terminated, he received a formal invitation from his superiors to attend the annual managers' meeting, which he co-ordinated, scheduled for March 1986. Yet, it was the same superiors who in February 1986 determined that Mr. Healy would be terminated.[4]

---

4. It bears noting that *after* his termination, Mr. Healy received his least complimentary evaluation. As the dissent correctly notes, this in and of itself demonstrates pretext.

Petitioner retained his position formally as MBO/R coordinator for a full one year without receiving any criticism from his superiors concerning the manner in which he was carrying out these responsibilities. In fact, Mr. Healy came in regularly, almost daily, contact with both Messers. Ubl and Hinrichs and neither party ever expressed any dissatisfaction with the manner in which Mr. Healy was performing this task. It is notable that within the context of Mr. Healy's overall responsibilities as Marketing Vice-President, his duties as MBO/R co-ordinator comprised 10% of his time. Surely the Company cannot be justified in focusing upon Mr. Healy's appointed position as MBO/R coordinator to defend its final decision to terminate him. However, that is precisely the inference to be drawn from the affidavits submitted to the District Court. Assuming *arguendo* that the Company was correct in its assessment of Mr. Healy as MBO/R coordinator, surely it could have removed him from that position without robbing him of his lifelong career.

In addition, by Mr. Russell's own admission, he became *de facto* Marketing Vice-President and assumed all of Mr. Healy's responsibilities on the same date that plaintiff was terminated. Indeed, immediately after Mr. Ubl informed Mr. Healy of his termination, he informed Mr. Russell of his new duties, which were identical to those of petitioner, as discussed, *supra*.

In *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1315-16 (9th Cir. 1982), it was stated:

> "The ADEA makes it unlawful for an employer to discharge any individual because of such individual's age. 29 U.S.C. §623(a) (1976). In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981), this court set out the requirements for a proper jury instruction on age discrimination. We adopted the 'determining factor' test

> established in *Laugesen v. Anaconda,* 510 F.2d 307, 317 (6th Cir. 1975), and restated as a 'but for test' in *Loeb v. Textron,* 60 F.2d 1003, 1019 (1st Cir. 1979). We rejected the argument that plantiff must prove age as the sole factor in his discharge, and upheld a jury instruction stating that plaintiff has the burden of proving that one of the reasons he was terminated was because of his age, and that he should prevail if this factor 'made a difference' in determining whether the plaintiff was retained or discharged.
>
> The essence of a proper jury instruction under *Kelly* is that it requires the jury to focus on the marginal effect of the age factor. Age need not be the sole factor in a discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present or even that it figure in the decision to fire; *age must 'make a difference' between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged.*" (Emphasis added).

In the instant matter, it is respectfully submitted that summary judgment was not appropriate. Significant issues of material fact exist from which a jury must render a final determination concerning the Company's intent and the inferences to be drawn from its actions.

It is well settled that absent direct evidence of age discrimination, petitioner can sustain his burden of proof and thereby withstand respondent's motion for summary judgment, through circumstanial evidence sufficent to raise an inference of intentional discrimination. (*Williams v. General Motors Corp.*

656 F.2d 120 (5th Cir. 1981); *Chippolini v. Spencer Gifts, Inc., supra; Sorba v. Pennsylvania Drilling Co., Inc., supra).* This applies with special force in the instant matter where Healy was never apprised of any performance deficiencies, was replaced by a younger person, and New York Life is asserting a flawed legitimate business justification for its management decision.

> "The plaintiff in an action under the ADEA, bears the initial burden of offering evidence sufficient 'to create an inference that an employment decision was based on discriminatory criterion illegal under the Act.' In order to satisfy this burden, plaintiff in his prima facie case must prove by a preponderance of the evidence that 1) he belonged to the protected age group; that is between the ages of 40 and 70; 2) he was discharged; 3) he was qualified for the position; and 4) the position was ultimately filled by an employee younger than the plaintiff. (*Nogar v. Henry F. Teichmann, Inc.*, 640 F. Supp. 365, 371, (W.D. Pa. 1985)."

In this regard, the dissent below correctly found:

> "Of course, the standard for summary judgment is the same whether a case would have otherwise been tried by a judge or a jury. But that standard as enunciated by the Supreme Court in *Celotex Corp. v. Catrett,* 447 U.S.C. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986) and *Anderson v. Liberty Lobby,* 477 U.S. 242 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) has been met here. In *Celotex,* the Supreme Court held that summary judgment is appropriate where the non-moving party has made out a prima facie case but must rebut the showing of the defendant. Similarly *Anderson* requires only

that in evaluating the strength of a prima facie case, the same standard be applied as would ultimately be applied by the jury. This case also governs only the sufficiency of the prima facie case. Neither *Celotex* nor *Anderson* gives a judge the authority to assess the strength of evidence or the credibility of witnesses' affidavits once the prima facie case has been adequately established.

Here the issue is not whether Healy has established a prima facie case; that is conceded. The issue is whether Healy has offered evidence from which a jury might reasonably infer that the reasons for his discharge articulated in response to his prima facie case were pretextual. This is the issue on which the legislative history finds that 'juries are more likely to be open.' This is more not less true where a reduction in force or reorganization is utilized to terminate older workers and difficult issues of pretext are presented.

Where Congress has expressly found 'a jury may be more neutral' than a judge, we should not be concerned that every charge of age discrimination arising out of a reduction in force will require a jury trial. We should be concerned that any corporation with an economic incentive for age discrimination will be able to mask it by arranging for a temporary reduction in force and/or reorganization with the assurance that if a charge of age discrimination is made, it can be tried to a court by self-serving post-litigation affidavits of 'fact.' We should be concerned that our decision places a burden on the older victim of discrimination unintended by Congress, the burden

> to convince a court he or she will prevail before allowing a jury to decide.
>
> If, as the majority believes, Healy's allegations of age discrimination are unfounded and age is not a substantial factor in his termination, a jury should and would decide against him. For the foregoing reasons, I respectfully dissent and would reverse the judgment of the district court and remand for a trial by jury."

The dissent correctly articulated the appropriate legal standard.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 7, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5484

WILLIAM JOSEPH HEALY, JR.,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY.

(D.C. Civil No. 86-4141)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE --- DISTRICT OF NEW JERSEY

Present: HIGGINBOTHAM and BECKER, *Circuit Judges* and SHAPIRO, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the --- District of New Jersey and was argued by counsel January 11, 1988.

On consideration whereof, it is now here ordered and

---

* Hon. Norma L. Shapiro, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

adjudged by this Court that the judgment of the said District Court, entered June 30, 1987, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ SALLY MRVOS
Clerk

November 7, 1988

Certified as a true copy and issued in lieu of a formal mandate on November 29, 1988.

Test:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 7, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5484

WILLIAM JOSEPH HEALY, JR.,

Appellant

v.

NEW YORK LIFE INSURANCE COMPANY,

Appellee

On Appeal From the United States District Court for the District of New Jersey
(D.C. Civil No. 86-4141)

Argued January 11, 1988

Before: HIGGINBOTHAM, BECKER,
Circuit Judges and
SHAPIRO, *District Judge*•

(Filed November 7, 1988)

• Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix B

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is an appeal from a grant of summary judgment for the employer in an action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982). The case was brought by William Healy, a former Vice President of New York Life Insurance Company ("the Company"), following his discharge as part of a company-wide reduction in force ("RIF"), which consolidated high-level management positions in response to competitive pressures. It is clear from the record that Healy established a prima facie case. It is also clear that the Company articulated

legitimate business reasons for assigning Healy's duties to a somewhat younger man who, the company claims, had demonstrated greater ability than Healy to assume high level managerial responsibility.

The difficult issue in the case is whether Healy demonstrated that a genuine issue of material fact existed concerning the Company's asserted non-discriminatory reasons for Healy's discharge. More specifically, we must determine whether the district court correctly decided that the legitimate business reasons articulated by the Company did not serve as a pretext to mask age discrimination. Our review is plenary. The question is a close one. However, we conclude that Healy did not meet his evidentiary burden of demonstrating a genuine issue of material fact as to pretext. We therefore will affirm the district court's grant of summary judgment in favor of the Company.

I.

Healy was fifty-six years old when the Company discharged him after twenty-five years of service. His tenure with the Company began in 1963 when he was hired as an agent. Healy was promoted several times, eventually becoming a Vice President of the Company's Marketing Department in 1979, responsible, *inter alia*, for the Company's internal communications. Because his performance with the Company after 1979 forms the factual matrix for the summary judgment ruling, we recite in some detail the relevant facts of record, developed through depositions, affidavits, and company documents (particularly performance evaluations).

At the time of Healy's 1979 promotion, the Marketing Department was composed of two divisions, agent training and management training. The agent training division taught agents to sell the Company's

insurance and financial products. To be successful, sales agents had to learn consumer psychology and technical matters such as the tax advantages of various products. Managers recruited and motivated the agents. The training of managers focused on personnel development, planning and organizing skills, managing expenses and achieving profitability, and the recruiting of new agents.

Prior to the reduction in force, several management levels supervised agent and management training. These levels included Assistants and Associates who reported to Managers, Managers who reported to Assistant Vice Presidents, and Assistant Vice Presidents who reported to the Vice President in charge of the division. During Healy's tenure as Management Vice President in charge of the Management Training division, another Vice-President, Ed Hesse, was responsible for agent training. Marketing Vice President Walter Ubl supervised both positions, and he, in turn, reported directly to the head of the Marketing Department, Senior Vice President Jerald Hinrichs.

This rough organizational scheme demonstrates that the Vice Presidents for both the agent and management training jobs were high-level executive positions possessing substantial management authority. Successful performance in these jobs required a resourceful executive willing to take initiative and to assume responsibility. At the time of his discharge, Healy managed a budget of close to $2,000,000 and directly supervised three Assistant Vice Presidents who were responsible for other Managers and Associates.

During the years immediately following his 1979 promotion, Healy received generally favorable evaluations. However, these evaluations also evidenced deficiencies in high-level executive performance. In a

November 1983 evaluation, Healy's immediate supervisor, Vice President Walter Ubl, reported that Healy "is a very experienced and valuable employee. . . . His extensive background with the company has enabled him to apply creative approaches to new challenges." App. at 50. But this same evaluation also noted that Healy became "so involved in [one] program that other ongoing programs cause him concern." App. at 50. Nevertheless, Healy received the highest rating possible in this 1983 evaluation and subsequently was promoted to Marketing Vice President in charge of management training in June 1984.

Although Healy earned favorable reviews in this new position, his evaluations revealed significant shortcomings. In a March, 1985 review, Healy's immediate superior (who is no longer with the Company) wrote that Healy "demonstrates significant people and team-building skills. He takes direction and guidance easily and quickly. . . . He utilizes good judgment in addressing his responsibilities." App. at 65. But like the earlier evaluation, the reviewer echoed the concern that Healy "must delegate more of the work-load and spend more time in staff development." App. at 65.

In August, 1985, Healy was assigned responsibility for preparing the Management by Objectives ("MBO") report for the entire Marketing Department. MBO is a management theory which posits that managers will be more effective if they can analyze what they must accomplish and develop measurable standards to determine if the desired objectives have been obtained in key result areas. The MBO was outside Healy's normal manager training duties and required him to focus on the work performed by the Marketing Department as a whole.

Since the MBO project implicated the interests of the entire Marketing Department, Healy worked closely

with his superiors, Hinrichs and Ubl. The affidavits of both Hinrichs and Ubl represent that Healy's coordination of the MBO program was unsatisfactory, and that his performance lacked creativity and initiative. According to the affiants, rather than exercising the insight and innovation that the project required, Healy merely collated and collected information from others. Hinrichs and Ubl state that Healy's poor performance created delays and resulted in additional work for both of them.

Reacting to this criticism, Healy testified that he thought that his function in the MBO project was to incorporate the same measurements that had been used previously, assemble the raw data, and pass the information on to his superiors rather than analyze the results himself. Healy further claimed that the MBO report was not assigned exclusively to him, that he never was informed that his performance was unsatisfactory, and that, in any case, he spent less than 10 percent of his time preparing the report.

Four months later, in December of 1985, the Company decided to reduce the total salary expenses of management personnel by 20 percent to remain competitive in an increasingly demanding business environment. As a result, the Company offered employees who were 55 years or older attractive early retirement packages. Departments that had not reduced managerial staff by 20 percent faced involuntary terminations. The Marketing Department was unable to reduce its total salaries by the requisite 20 percent, despite the early retirement of Ed Hesse, the Vice President in charge of agent training.

On February 25, 1986, Hinrichs informed Healy that he was being discharged. The Company also discharged seven other members of the Marketing Department at the same time. Hinrichs represented that Healy was discharged because he

> could neither effectively supervise a combined [manager and agent] training division nor effectively handle the substantial increase in responsibility that would have been required had he been retained. I found that the plaintiff, rather than taking it upon himself to broaden his responsibilities, would instead try to narrow the scope of his functions. He appeared reluctant to assume expanded responsibilities and encountered problems when faced with coordinating a substantial number of on-going programs. Moreover, he was not good at identifying important future problems or objectives and deciding how to meet them. He also tended to focus only on his own area of responsibility.

App. at 141-42. Hinrichs further states that his decision also reflected Healy's inadequate performance on the MBO program.

Following Healy's discharge and the voluntary retirement of the Vice President for agent training, Hinrichs initially decided to reallocate the responsibilities of these two positions among the Assistant Vice Presidents. He decided to leave the Vice President positions vacant and to determine later whether to create a consolidated position, combining the functions of both jobs. Most of Healy's responsibilities were assumed by Paul Russell, age 47, with the exception of the MBO program, which was assigned to another Vice President, Richard Carter, age 55. At the time of Healy's discharge, Russell had been with the company 22 years, most recently serving as one of Healy's three Assistant Vice Presidents.

Hinrichs and Ubl both testified that Russell's performance during the period following Healy's departure was superior to Healy's prior performance. As a result, in July, 1986, Hinrichs reorganized the

Marketing Department, combining the responsibilities of the Vice Presidents in charge of agent training and management training into one position under Russell's direction. This combined position involved more responsibility than the job from which Healy had been discharged and required someone with a broad perspective on the operations of the Marketing Department, willing to assume responsibility for both agent and management training in the post-RIF business environment. Indeed, Russell was ultimately responsible for a budget of 4.7 million dollars -- over twice as much as Healy's at the time of his discharge. In justifying this promotion, Ubl contends that Russell

> was an excellent manager with the capability of assuming greatly expanded responsibilities. Mr. Russell had conceived, designed and executed numerous valuable programs and initiatives and was the type of manager who would enlarge his job to ensure that it was done as effectively as possible, and was well able to handle the additional responsibility.

App. at 167.

On July 9, 1986, Healy filed an age discrimination charge with the Equal Employment Opportunity Commission. On August 4, 1986, the Company completed Healy's final evaluation. This evaluation reemphasized Healy's limitations in assuming responsibility outside the formal boundaries of his job description. The evaluation rated him a 3 on a scale of 1 to 5 (1 is the highest), as opposed to the 1 Healy had earned in his 1983 review and the 2 he had received in 1985. Although the evaluation mentioned Healy's broad experience and his communication skills, it also found that Healy "too zealously guards his 'turf' to the extent subordinates feel little opportunity to expand areas of responsibility." App. at 82. Furthermore, the

review stated that Healy lacked an "acquisitive view of what needs to be done as part of his job." The report noted that Healy "needs to delegate more -- take a bigger view of his job. Must be more future oriented -- focuses on the here and now." App. at 82.

On October 21, 1986, Healy brought suit in the district court for the District of New Jersey, alleging that his discharge violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982). Healy's complaint sought damages for lost income and benefits, reinstatement and restoration of benefits, liquidated damages, costs, and attorneys' fees. Upon the completion of discovery, the Company moved for summary judgment on the ground that Healy had failed to raise a genuine issue of material fact supporting his contention that his termination resulted from age discrimination.

In its summary judgment papers, the Company proffered statistical evidence to support its position that it did not use the RIF as a vehicle for age discrimination. The evidence showed that the Company-wide percentage of employees over the age of forty remained essentially the same as a result of the RIF. Similar results occurred in the Marketing Department. Of the thirty-four Marketing Department employees who were fifty years or older at the time of the RIF, Healy was the only one fired. The statistics are set forth in more detail, *infra* typescript at 22-23. The data did not, however, include the employees who elected early retirement.

Analyzing the record in response to the Company's motion for summary judgment, the district court first found that "[t]he Company has presented substantial evidence to support its claim Healy was not discharged because of his age." App. at 195. The court identified legitimate business reasons supporting the Company's decision, including a company-wide RIF which

increased the percentage of employees in the protected age group, specific shortcomings in Healy's performance, and the Company's judgment that another executive (Russell) "was more highly qualified to handle the post-reduction consolidated responsibilities." *Id.* at 196. The court then concluded that Healy had "submitted no specific facts either to affirmatively support the allegations contained in his complaint or to rebut or undermine the evidence presented by the Company." *Id.* at 198. It therefore granted the motion for summary judgment. This appeal followed.

II.

A.

The requisites for proof of age discrimination and the standards governing the grant of summary judgment in ADEA cases have been explained in numerous opinions. *See Chipollini v. Spencer Gifts Inc.*, 814 F.2d 893 (3d Cir.) (in banc), *cert. dismissed*, 108 S. Ct. 26 (1987); *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988). *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-57 (1981) (analogous standard for gender discrimination). We need not restate those standards here, though we shall, of course, apply them in our discussion. Before analyzing the facts of record in light of these standards, we make two preliminary comments.

First, Healy sought to satisfy his required burden of proof of intentional discrimination by the use of indirect rather than direct evidence, as the law permits. Second, we are satisfied that Healy established a prima facie case, since he showed that: (1) at age fifty-six he was a member of a protected class; (2) he was qualified for the position from which he was

discharged; (3) he was discharged despite his qualifications; and (4) the position was filled by a person sufficiently younger to permit an inference of age discrimination.[1]

Given the facts set forth above about the demands of high-level management positions and the deficiencies in Healy's performance, the Company proffered a legitimate business reason for discharging Healy. We turn therefore to an analysis: (1) of the Company's legitimate business reasons for the discharge; and (2) of Healy's claim of pretext with a view to determining whether Healy has raised a genuine issue of material fact. To facilitate this analysis, we review the evidence in four separate

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1. The Company asserts that to establish a prima facie case in the context of a RIF this fourth criterion requires Healy to prove that after his discharge a *less* qualified employee was retained in the *same* position. We disagree. To establish a prima facie case, Healy does not have to demonstrate that he was more qualified than the person who took the exact same job; it is sufficient to show that he was discharged, while the Company retained someone younger. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n.2 (3d Cir.) ("Duffy would ... have established a prima facie case, by proof that he was discharged while ... a younger employee was retained."), *cert. denied*, 469 U.S. 1087 (1984); *Massarsky v General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.) (The "prima facie case is easily made out: A plaintiff alleging a discriminatory layoff need show only that he is a member of a protected class, and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably."), *cert. denied*, 464 U.S. 937 (1983).

Surveying our jurisprudence, we observe that because the prima facie case is easily made out, the prima facie case is rarely the focus of the ultimate disagreement. Rather, "the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a non-discriminatory reason for the [discharge]." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983). Generally, the true focus of age discrimination cases occurs when the defendant articulates legitimate business reasons and the plaintiff submits evidence of pretext.

sections. First, we look at Healy's qualifications as represented by his evaluations and by his performance on the MBO. Next, we turn to Russell's performance. Then, we examine the statistical evidence presented by the Company. Finally, in terms of the legal standard, we examine the record to see if Healy has presented specific evidence that "*could* support an inference that the employer did not act for non-discriminatory reasons." *Chipollini*, 814 F.2d at 900 (emphasis in original).

We note preliminarily that each ADEA case must be judged on its own facts. The legitimacy of the employer's proffered business justification will be affected both by the duties and responsibilities of the employee's position, and the nature of the justification. Concomitantly, the significance of variations among an individual's personnel evaluations may well depend upon the nature of the employee's responsibilities; a more exacting standard of performance may have to be applied to positions of greater responsibility.

B.

Both Ubl and Hinrichs submitted affidavits identifying specific weaknesses in Healy's performance. These affidavits stated that Healy did not delegate enough, that his focus was too narrow, and that he did not readily assume new responsibilities outside the formal boundaries of his job description. As Ubl states in his affidavit:

> I found that the plaintiff lacked an acquisitive view of his job, and rather than taking it upon himself to broaden his responsibilities, would instead try to narrow the scope of his functions. I found that the plaintiff was reluctant to assume expanded responsibilities, and that he encountered problems when faced with coordinating a substantial number of ongoing programs. Plaintiff

> tended to focus only on his own area of responsibility, and even in that role, he had substantial difficulty in effectively delegating work to lower-level employees. Instead, he would become enmeshed in details himself, while losing sight of the broader picture. In addition, the plaintiff was not good at identifying important future problems or objectives or deciding how to meet them. . . . I determined that he did not possess the management abilities that would render him capable of adequately handling the substantial increase in responsibilities that would be required following the reduction or of effectively managing a combined . . . division.

App. at 165-67; *see also* Hinrichs affidavits, *supra* typescript at 7. These allegations also were supported by Healy's performance reviews in 1983 and 1985, and by his post-termination evaluation. *See supra* typescript at 2-5. Nevertheless, Healy makes three arguments that these identified weaknesses were pretextual.

First, Healy argues that the same evaluations cited by the Company as evidence of his unwillingness to take the initiative also contain portions that showed that he assumed new responsibilities. However, this fact does not refute the Company's legitimate business reasons for his discharge, even when read in the light most favorable to Healy. These 1983 and 1985 evaluations referred to jobs that demanded less responsibility and initiative than the consolidated position eventually filled by Russell. Good (or even excellent) performance in a lower level position does not necessarily imply success in a more competitive environment. Furthermore, although often complimentary, the reviews did note that Healy had problems delegating authority, and managing multiple projects -- factors clearly relevant to the demanding managerial job that Russell eventually filled.

Second, Healy points out that the Company promoted him immediately following the very 1983 evaluation which it uses to demonstrate his shortcomings as a manager. However, a promotion from a lower level job, despite identified weaknesses, does not suggest that the weaknesses do not exist or that they would not be important in evaluating performance in a more demanding job.

Finally, Healy notes that his 1986 post-termination evaluation is dated August 4, three weeks after he filed a charge of age discrimination with the EEOC. We recognize that in *Gunby v. Pennsylvania Electric Company*, 840 F.2d 1108 (3d Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3834 (U.S. May 25, 1988), this court found that a highly unfavorable performance evaluation prepared after an employee expressed his view that he might have been passed over for a promotion because of race discrimination provided evidence of pretext. In the case *sub judice*, however, Healy's post-termination evaluation was not substantially different from his previous ones. Although Healy descended one notch in the numerical ratings, the 1986 evaluation cited performance problems that had been apparent in previous reviews. Healy submitted no evidence indicating that this review was aberrational or in any way pretextual. Thus, Healy has not demonstrated that the identification by the Company of shortcomings in his performance in his 1983, 1985, and 1986 evaluations were pretextual.

Post hoc explanations, like any self-helpful statement made after the initiation of a lawsuit, may be to some degree suspect. However, the mere fact that a defendant relies on a *post hoc* evaluation does not in and of itself create a factual dispute about whether the evaluation is pretextual. To the extent that the dissent argues that a *post hoc* justification *ipso facto* creates a

pretext, it is plainly wrong. Unless the plaintiff introduces counter-affidavits and argumentation that demonstrate that there is reason to disbelieve this particular explanation, there is no genuine issue of material fact. *See* C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure* § 2726, at 118-19 (1983) ("[T]he general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment.").

C.

The Company relies heavily upon Healy's unsatisfactory efforts in coordinating the MBO. As we have noted, the MBO involved the development of measurable standards to determine if corporate objectives have been met in key result areas. The task of preparing the Marketing Department's MBO, assigned by Hinrichs to Healy, required careful analysis to ensure that meaningful information was incorporated into the standards. Hinrichs and Ubl expected Healy to assume broad responsibility, adopting the perspective of the Marketing Department as a whole. In contrast, Healy narrowed his focus on the MBO, concentrating on merely collecting and collating data. Rather than sorting through the data analytically and challenging inappropriate information, he shifted the responsibility to his superiors.

Healy's deposition testimony itself suggests he had a limited view of his role:

> Q. ...[T]hey would give you the figures and you would just plug them in?
>
> A. Yes.
>
> Q. You had nothing to do with these figures other than the mechanical?

A. That's true. That was not my job to originate these figures. It was to coordinate and to finalize them on this form.

Q. When you say finalize, do you mean anything other than taking them and putting them on the form?

A. Putting them on the form and then passing it [to Ubl and Hinrichs] for their approval.

. . .

Q. Does [Healy] say, this looks right to me, this doesn't look right to me or does he say, thank you very much, I'm going to put them on the form?

A. My job was to obtain the figures, not to discuss them as to the suitability of the figures.

App. at 126-27.

In response to the Company's allegations that his performance was unsatisfactory (in light of the expectations of Hinrichs and Ubl), Healy responds that he was never warned that he was doing a bad job. Although we can sympathize with Healy's situation and observe that employees will perform better if they receive feedback, we note that from a legal perspective managers are not compelled to convey their dissatisfaction to employees. *See Pierce v New Process Co.*, 580 F. Supp. 1543, 1545 (W.D. Pa.), ("[T]he company is under no obligation to warn plaintiff of complaints regarding his performance and, if anything, the effect of such evidence is equivocal, perhaps indicating that plaintiff was receiving the benefit of the doubt."), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984).

Healy also argues that he spent less than 10 percent of his time on the MBO. Ten percent of an executive's time, however, can be substantial,

particularly if spent on projects the company values. In any case, our inquiry must concern pretext, and is not an independent assessment of how we might evaluate and treat a loyal employee. *See Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 647 (5th Cir. 1984) ("The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into personnel managers."). Moreover, the significance of the evidence about the MBO does not lie in the amount of time Healy chose to spend on the project or his own judgment about its importance, but on what his performance indicates about his ability to meet employment challenges.

We conclude that Healy did not provide enough evidence with respect to the Company's MBO evaluation to give rise to an inference that the Company's proffered business justification is pretextual.

D.

The company presented evidence that Russell's managerial ability was highly regarded. Hinrichs, in his affidavit avers that:

> Russell . . . performed his own work and that of the Marketing Vice President as well, and did the combined job better than [Healy] had done his [own smaller job]. . . . Mr. Russell's promotion . . . was in recognition of his consistently superior performance and the high level of management ability he had displayed over a long period of time. Mr. Russell had shown himself to be creative, innovative and willing to take the initiative to broaden the scope of his responsibilities. Moreover, Mr. Russell had had recent, extensive experience in agent training. During his nearly 20 years in Company field offices, he had worked in

several positions where he was responsible for agent training.

App. at 143-44; *see also* Ubl's affidavit, *supra* typescript at 9. Even Healy in his deposition and written evaluation speaks well of Russell:

Q. What was your judgment of Russell's effort?

A. Excellent. I was very proud of him.

App. at 108. Similarly, Healy's evaluation of Russell noted that Russell shows "significant initiative" and "self starting abilities." App. at 74.

The record reflects that Russell demonstrated a willingness to assume new responsibilities and that he was flexible and able to delegate. Throughout his tenure in the training division, Russell conceived, designed, and executed numerous programs and initiatives. He also increased his effectiveness. These are the very traits that Hinrichs and Ubl felt Healy lacked. The Company thus credibly argues that the decision to promote Russell was based on his creativity and superior management ability.

Healy notes that he had a higher evaluation than Russell in at least one category. Healy's performance was rated "effective" (the middle category of three) or as a "notable strength" (the highest category) in every relevant category in a March 1985 evaluation; in contrast, Russell was found to "need improvement" in his written communication in a similar April 1985 evaluation. Nevertheless, nothing in the record suggests that, compared with other managerial skills, writing was such an important part of the combined job to which Russell acceded. Moreover, Healy did not point to any other weaknesses in Russell's performance. We thus find insufficient evidence of pretext to permit a reasonable fact finder to infer discrimination in the Company's selection of Russell over Healy.

E.

The Company submitted, along with its affidavits, statistical evidence suggesting that the RIF did not have a disproportionate impact on older workers. We have approved the use of statistical evidence to support a plaintiff's claim of disparate treatment. In *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988), the plaintiffs alleged that USX's overall system of hiring was discriminatory, but they did not challenge specific procedures or decisions. We held that statistical evidence showing that, in the aggregate, equally qualified blacks were less likely to be hired was sufficiently probative to make out a prima facie case in a disparate treatment class action suit. In *Green*, the statistical evidence supported the plaintiff. As a matter of logic, statistical evidence could also be relevant when it buttresses the claims of the defense. Additionally, the Supreme Court has explained that "a non-discriminatory 'bottom line' and an employer's good-faith efforts to achieve a non-discriminatory work force, might in some cases assist an employer in rebutting the inference that particular actions had been intentionally discriminatory." *Connecticut v. Teal*, 457 U.S. 440, 454 (1982).

Nevertheless, we approach the use of statistical evidence presented by the defense in a disparate treatment case with caution. We emphasize that "statistics are not irrefutable; they come in infinite variety, and, like any other kind of evidence they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

We are skeptical that use of statistics, however compelling, can in and of itself constitute a complete defense in disparate treatment cases. The Supreme Court has made clear that statistical evidence

demonstrating that an employment policy, considered as a whole, is non-discriminatory does not completely insulate employers from disparate treatment suits. "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978). The very nature of disparate treatment cases focuses on the bias against an individual because of age, race or sex. Because such bias is irrational, it may not follow a consistent pattern. As the Supreme Court explained: "Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group." *Connecticut v. Teal*, 457 U.S. at 455. Furthermore, statistics are often unreliable because company-wide data may mask discrimination on a smaller scale. In sum, statistical evidence can be probative if cautiously and critically applied, but it cannot end our inquiry.

According to the uncontested statistics provided by the Company, the percentage of employees at the Company over the age of forty remained the same after the RIF terminations.[2] More particularly, in the Marketing Department, the percentage of employees in the protected age group remained essentially the same following the discharges. The Company discharged eight out of the 125 Marketing Department employees who remained after the voluntary retirement plan. Before the RIF, the Marketing Department had sixty-three people forty years old or over. Of the eight terminees, four were in the protected age group. Healy was the only person over fifty. Three of the other discharged employees were between the ages of forty

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2. The ADEA protects individuals "who are at least forty years of age." 29 U.S.C. § 631(a) (Supp. IV 1988).

and forty-four. Among the ten employees at Healy's level before the RIF, Healy was the only one discharged. Of those Vice-Presidents retained, one was fifty-nine years old, three years older than Healy, and another fifty-six. In fact, six of the nine Vice-Presidents retained were age fifty or older.

We observe that these results may have been different if the older employees who accepted early retirement had been accounted for. The Company, however, provides no such statistics. Although Healy has not challenged the Company's statistical evidence, we note that the number of older workers may have been substantially reduced by the early retirement plan, and that the Company's statistics concerning the pre- and post-RIF workforce may be misleading. Furthermore, because Healy claims that Hinrichs and Ubl discriminated against him personally on the basis of age, statistical evidence concerning the Company-wide discharge patterns is tangential to the behavior of the relevant decision makers.

The only relevant statistical evidence concerns the Marketing Department's discharge patterns -- discharge decisions made by Hinrichs. This evidence tends to support the Company's assertion that termination decisions by Hinrichs and Ubl were not the result of age discrimination. It therefore corroborates, at least in some measure, the legitimate business reasons articulated by the Company for Healy's discharge.

III.

In evaluating the evidence, Healy relies heavily on our decision in *Chipollini v. Spencer Gift Inc.*, 814 F.2d 893 (3d Cir.) (in banc), *cert. dismissed*, 108 S. Ct. 26 (1987). There, the in banc court reversed the district court's grant of summary judgment, explaining:

> The proffered reason for discharge is a subjective one. The plaintiff challenges the defendant's post-litigation articulation of its intent and the documentary evidence can be viewed as supporting the plaintiff's challenge. Consequently, the issue of pretext turns on [the employer's] credibility and is not appropriate for resolution on a summary judgment motion.

Id. at 901. We emphasize that, despite the breadth of the language in *Chipollini*, discrimination cases are inherently fact-bound. Certainly *Chipollini* does not stand for the proposition that summary judgment is *never* available in discrimination actions. Rather, we understand the teaching of *Chipollini* to be that where plaintiffs proffer evidence of pretext and create a genuine issue of material fact as to the credibility of the employer's "legitimate" business reasons, summary judgment is foreclosed.[3]

Indeed, because the plaintiff introduced substantial evidence of pretext in *Chipollini*, it presents a good example of a case in which a court cannot grant summary judgment. In *Chipollini* the plaintiff rebutted the defendant's proffered reasons for the discharge: (1) a medical problem cited by the defendant as a reason for the discharge was shown not to affect Chipollini's job performance; (2) the plaintiff's immediate supervisors could not identify a single specific example of poor performance by him; and (3) the defendant alleged that Chipollini had inadequately performed his duties as energy warden, when in fact the company never clearly asked him to perform such duties. *Chipollini*, 814 F.2d at 900-01.

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3. The dissent seems to suggest that the standard for summary judgment should be more stringent here because this is a case that would otherwise go to a jury. However, the standard for granting summary judgment is the same regardless of whether the case would have otherwise been tried by a judge or a jury.

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Similarly, the case at bar is distinguishable from *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988). In *Sorba*, the defendants claimed that Sorba's dismissal had been for unsatisfactory performance on his last three jobs. The defendants claimed that Sorba "padded jobs, accrued unnecessary overtime, caused morale problems by criticizing the company and refused on occasion to take direct orders." *Id.* at 203. However, the deposition testimony of Sorba's two immediate supervisors suggested that Sorba's performance did not cause the problems associated with his last three jobs. Nor could the Supervisors claim specific problems with his performance, or identify instances where he was a detrimental influence. *Id.* at 204. Furthermore, Sorba gave several reasonable explanations for the problems encountered on the three jobs cited by the defendants.

Unlike the plaintiffs in *Chipollini* and *Sorba*, Healy has been unable to demonstrate specific evidence "that could support an inference that the employer did not act for non-discriminatory reasons." *Chipollini, supra*. Healy has thus not presented the court with a genuine issue of material fact as to whether, "but for" his age, he would not have been discharged. *See supra* typescript at 13 (articulating the standard for summary judgment).

We acknowledge that this is a close case. The Company has shown that competitive pressures led to a company-wide RIF which forced a consolidation of several high-level executive positions, one of which was occupied by Healy. Within this context, the Company has presented substantial evidence that its decision to discharge Healy was for legitimate business reasons. The Company identified specific weaknesses in three of Healy's performance evaluations, cited a recent and important project where Healy performed

unsatisfactorily, and proffered evidence showing that Healy's replacement was better qualified to exercise the kind of initiative, creativity, and managerial discretion required of a high level executive. Furthermore, the Company corroborated these legitimate business reasons with statistical evidence suggesting that there was no discriminatory intent by the relevant decision makers.

On the other hand, as Healy has pointed out, up until his discharge he received reasonably favorable employment evaluations, and had been promoted by the company. Moreover, there are some differences in tone between the evaluations he received while working, and the *post hoc* evaluation. We are satisfied, however, that the differences between the employment evaluations is one of degree rather than of kind. The problems that the *post hoc* review identifies are the same problems that were noted by the reviewers in 1983 and 1985. Thus we do not think that the differences in the evaluations themselves create a genuine issue of material fact.

In the end, the evidence provided by Healy demonstrates only that he performed competently in his previous jobs. But the essence of a RIF is that competent employees who in more prosperous times would continue and flourish at a company may nevertheless have to be fired. To create a factual dispute as to pretext, Healy must not only introduce evidence from which a reasonable person could infer that he is qualified; he also must introduce evidence that casts doubt on his employer's contention that there was a legitimate business justification for letting him to go. We agree with the district court that Healy's efforts to contrast his qualifications vis-a-vis Russell's, given his limitations described above, are legally insufficient to cast such doubt. Barring any attempt to hide discrimination, the Company has the right to

make business judgments on employee status, particularly when the decision involves subjective factors such as creativity and initiative that the Company deems essential to high-level executive positions.

The judgment of the district court will be affirmed.

Shapiro, J., Dissenting

Plaintiff, William Joseph Healy, filed a complaint seeking relief from alleged age discrimination by his former employer in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 *et seq.*; he asserted his right to the trial by jury granted by Congress in making age discrimination actionable. 29 U.S.C. 626(c)(2). Upon review of the pleadings, discovery and supplemental affidavits, the district judge determined that although questions of fact precluded a finding that plaintiff had not made a *prima facie* case, defendant had offered evidence that plaintiff's termination was based on factors other than age and plaintiff had not met his burden of producing either direct evidence of discriminatory intent or evidence from which an inference of discrimination could be drawn.

In reaching this conclusion the district judge's opinion discussed not whether sufficient evidence was produced from which a reasonable jury might infer age discrimination, *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3d Cir. 1987), but whether the evidence had "substance." That is, the grant of summary judgment relied on determinations of the credibility of affiants in weighing the evidence. Because I believe that a grant of summary judgment for defendant is inconsistent with a recent *in banc* decision of the Court of Appeals, and usurps the role of the jury in age discrimination cases, I respectfully dissent from the majority opinion.

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It is important in reviewing the record below to remember that this is an *age* discrimination case, *not* a case alleging discrimination based on race or sex which is tried to a court not a jury under Title VII, 42 U.S.C. § 2000e *et seq*. The ADEA expressly and deliberately created a cause of action to be tried to a jury so that issues of age discrimination would not be disposed of by federal judges. When Senator Kennedy introduced the amendment to the ADEA which provided for jury trials, he stated that it was an important addition to the legislation because,

> juries are more likely to be open to the issues which have been raised by the plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he himself is protected by life tenure, or because he is somewhat removed from the usual employer-employee relationship. The Jury may be more neutral in such circumstances.

Cong. Rec. S34318 (October 19, 1977), reprinted in Legislative History of the Age Discrimination in Employment Act, at 505 (1981).

Following his termination, plaintiff filed this action alleging a violation of the ADEA. Defendant responded that it was protected by an exception to the ADEA (29 U.S.C. 623(f)(1)) as the termination of plaintiff was for a "reasonable factor other than age." At the close of discovery, defendant moved for summary judgment, on the grounds that (1) plaintiff had not made out a *prima facie* case of age discrimination and (2) plaintiff could offer no evidence to rebut defendant's assertion that his discharge was for reasonable factors other than age or that this explanation for the discharge was pretextual. The district court held that questions of fact precluded summary judgment on the ground that plaintiff had not made out a *prima facie* case; that is, plaintiff had met the burden of showing the four factors required:

... '(1) he belongs to a protected class; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination.' *Chipollini v. Spencer Gifts, Inc.*, 814 F. 2d 893, 897 (3d Cir. 1987). Drawing inferences from the record favorably to Healy, questions of fact preclude summary judgment on this point.

Letter-Opinion and Order, Lechner, J., June 25, 1987, p. 12 (A195), n.1.

Because defendant articulated evidence of economic necessity for a reduction in force and evidence that plaintiff was less qualified than his replacement, plaintiff concededly was required to offer evidence from which a jury might reasonably infer that the reasons given for his discharge were pretextual and that age was a determinative factor in his termination.

However, the trial judge credited the affidavits submitted by defendant in support of its position, determined that the plaintiff offered no evidence of "substance" and had come forward with no "facts to demonstrate age was a factor" in his termination, and granted summary judgment. But the proper standard does not require the plaintiff to prove his case to the satisfaction of the trial judge in order to present his claims to a jury. Plaintiff meets his burden merely by presenting evidence from which it could reasonably be inferred that he was not dismissed for the reasons articulated by the employer.

> The jury need only decide whether the employer dismissed [Healy] because of reports from his supervisors.... If not, it is more likely than not that the employer based his decision on an impermissible consideration such as age.

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Sorba v. Pennsylvania Drilling Co., Inc., 821 F.2d 200, 205 (3d Cir. 1987).

In *Sorba*, the Court of Appeals followed its recent *in banc* decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (*in banc*). *Chipollini* stands for the proposition that to avoid summary judgment in favor of defendant in an age discrimination reduction in force case, it is not even necessary for a plaintiff to submit direct evidence of pretext to rebut defendant's claim of a legitimate reason for the discharge. Plaintiff only has to present evidence sufficient to create the inference that the reasons given for his discharge were pretextual. In other words, plaintiff must submit "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [that] reasonably *could* support an inference that employer did not act for non-discriminatory reasons" and not "evidence [that] *necessarily* leads to that conclusion that the employer did act for discriminatory reasons." *Id.* at 900. If an employee produces enough evidence to support an inference that the reasons given for the discharge were pretextual, the court should not grant the employer's motion for summary judgment even if it believes a jury would or should find for the defendant.

The district court found that Healy established a *prima facie* case if inferences from the record were drawn favorable to the non-moving party as the law requires. But the court also found that the company presented "substantial evidence" to support its claim that Healy was not discharged because of his age. Letter-Opinion and Order, Lechner, J. at p. 12 (A195).

First, there was affidavit testimony of the non-discriminatory impact of the reduction in force which supposedly showed that "Healy's termination was not the product of systematic age-based discrimination on the part of the company." *Id.* at 13

(A196). Statistical evidence was offered to show that the company-wide percentage of employees over the age of 40 remained essentially the same as a result of the reduction in force. Of course, this data did not include the employees who elected early retirement. Although subject to challenge, this evidence was admissible to show lack of intent to discriminate against Healy because of his age. But Healy is claiming age discrimination against him personally; non-disparate impact is only evidentiary not conclusory. The reasons for lack of reliance on this statistical evidence in support of defendant's position that it did not use its reduction in force as a pretext for age discrimination are well stated in Section E of the majority opinion.

Second, there was affidavit testimony of two superiors, Ubl and Hinrichs, which supposedly showed that the decision to terminate Healy and give his responsibilities to Russell was based on a managerial perception that Russell was more highly qualified to handle post-reduction consolidated responsibilities; this was allegedly supported by documentary evidence (performance evaluations of Healy and Russell before and after litigation was instituted). The signed statements of Hinrichs and Ubl, prepared by them or their company's attorney after the fact, are inconsistent with contemporaneous evaluations of each employee.

The district judge then found Healy submitted no specific facts either to support the allegations of his complaint or to rebut or undermine the evidence presented by the Company in support of its motion. However, Healy could point to the following specific facts which, if credited, establish a genuine issue for trial because a rational trier of fact could find in his favor; *see Matsushita Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986):

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1. The Company's 20% reduction in force supposedly in response to competitive pressures was accomplished in part by the offer of early retirement to employees 55 years or older; Healy declined to accept this option.

2. The President's letter of January 28, 1986, to all agents and employees reported a "good year for new business" and referred to impressive performance not the need for further reductions in force as might be expected. (A78).

3. Healy, age 57, enjoyed a long and successful relationship with New York Life. He was promoted regularly and seemingly routinely. By the time of his discharge, following 23 years with the Company, he had risen from the rank of Agent to that of Marketing Vice President.

4. Plaintiff's performance evaluations were consistently positive. He had received a favorable job performance evaluation as recently as March 25, 1985. (A62). This 1985 evaluation said,

> He demonstrates significant people and team-building skills. He takes direction and guidance easily and quickly. He demonstrates a genuine business concern for people. He utilizes good judgment in addressing his responsibilities. Due to the above factors, he has earned the respect and loyalty of his divisional employees.

In fact, prior to his discharge, Healy had received only scores of "A Notable Strength" and "Effective Performance".

5. Healy's last pre-termination performance review on March 25, 1985, was by John Wm.

Zorio; his views are relied on by the Company to establish Healy's inability to delegate. Under the heading "Opportunities for Improvement," Zorio stated, "[h]e must delegate more of the work-load and spend more time in staff development." (A65). But under the heading "Management Skills and Abilities," his performance in delegating assignments and authority was graded as "Effective Performance." While not listed as a "Notable Strength," neither was it categorized as "Needs Improvement." That same evaluator noted under "Attainment of Annual Objectives," that Healy's performance was characterized by "Excellent Results Achieved in *all* KRAs ("Key Result Areas"). Zorio then commented, "He has made significant contributions in *numerous* and varied task force/committee assignments. Healy's overall performance rating was, "[e]xceeds the level of performance required to fulfill the responsibilities of this position."

6. In contrast, on August 4, 1986, six months *after* Healy's termination, one month after his complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC"), and with no apparent need for evaluation of an "outplaced" employee, Ubl prepared a "Performance Evaluation" listing satisfactory performance in three key result areas with the fourth, "Management by Objective" ("MBO") "in progress." For the first time, Healy, a terminated employee, is graded as "needs improvement in three respects, "Planning and Organizing Work," "Delegating Assignments and Authority," and "Developing Subordinates" (even though it was the younger

subordinate he developed who was supposedly so effective in replacing him). Even this evaluation commented favorably on his good communication skills, knowledge and experience. Then Ubl added, "Bill too zealously guards his "turf" to the extent subordinates feel little opportunity to expand areas of responsibility. Needs to delegate more -- take a bigger view of his job. Must be more future oriented -- focuses on the here and now --Broaden horizon -- must assume more and different responsibilities a more acquisitive view of what needs to be done as part of the job." (A82).[4]

7. Healy stated under oath that his assignment to coordinate the MBO program for the Marketing Department took no more than 10% of his time. Of course, 10% of an employee's time can be substantial if spent on an important project. But regardless of how a court might evaluate its importance, the limited time or relatively minor role, if magnified by the employer, can also be evidence of pretext.

Healy was cross-examined extensively concerning his role in preparing the MBO for 1985-86 at his deposition. The testimony cited by the majority from A125-127 certainly suggests his limited view of his role; moreover,

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4. The majority opinion views this post-termination evaluation as not substantially different from his previous ones. It adds that Healy submitted no evidence indicating this review was aberrational or in any way pretextual. But in my opinion the lack of need for an evaluation of a terminated employee is itself evidence of pretext; the post-termination evaluation is also inconsistent with itself and in comparison with prior evaluations. Therefore, its very existence is aberrational and pretextual.

it was a view differing from that articulated for the Company in the defense of this cause of action. The full excerpts from the Healy deposition (A118-125; A128-133) show an understanding of the MBO project that differs from that of the defendant; this sharp conflict in the testimony should be resolved by the trier of fact. Neither the majority nor the trial judge should decide that Healy's view is inherently incredible. Healy is in no different a position than Chipollini or Sorba in denying under oath these post-litigation complaints of his performance.

8. Healy was never warned he was doing a bad job and he knew he was doing a good job. (A103). Of course, managers are "not compelled to convey dissatisfaction to employees," but absence of prior complaints about performance is evidence of pretext. Others, including people in marketing, were given indications of termination and told to take the voluntary retirement offer. (A136). Healy was not.

9. Hinrichs cited only the need for reduction in force in Healy's termination interview. (R106). In Marketing, two vice presidents, Hesse (agent training) and Healy (management training) had reported to Marketing Vice President Walter Ubl who, in turn, reported to Senior Vice President Jerald Hinrichs, the head of the Marketing Department. Hinrichs stated that with Hesse's opting for early retirement, he had determined to eliminate Healy's position as well. The alleged inadequacy in Healy's performance, like the alleged superiority of his replacement, Paul Russell, was discovered only after this litigation commenced.

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10. The April 15, 1985 Performance Review of Paul Russell, who assumed most of Healy's work responsibilities following his discharge, suggests more reason for concern regarding professional capabilities than Healy's evaluation that same year. (A71). Russell received a grade of "Needs Improvement" in the area of written communications. In the comment section of the evaluation, Zorio stated that, "[h]e needs improvement in written communication area." (A73). The position to which Russell was recommended for promotion by Ubl on July 1, 1986 requires "frequent ... written contact" with company personnel, field management and vendors. (A150).

    It was not until approval of the September 1, 1986 promotion recommendation of Russell that his abilities merited recognition at the Grade 18 level, a Grade level Healy had attained as early as July 1, 1984. (A55).

    Healy does not have to prove he was more qualified than Russell to survive a motion for summary judgment; he need only produce evidence that the company's supposed judgment at the time of termination that "Russell was more highly qualified to handle the post-reduction consolidated responsibilities" (A198) was pretext. In view of Healy's good performance in management training and prior experience in agent training, compared to Russell's lack of dual experience, Healy has succeeded in meeting his burden on this record.

11. Delay in combining the positions of Marketing Vice President for Management Training and

Marketing Vice President for Agent Training from February until July, as explained by Hinrichs in his affidavit in support of the summary judgment motion suggests doubts as to his conviction of the ability of Russell at the time of Healy's termination and reflects on the credibility of the substance of the other averments therein. (A138).

12. Healy did not adequately respond to the statistical evidence proffered by the company, but it was not his burden to do so. Healy alleges disparate treatment not disparate impact. As correctly stated by the majority, the statistics are of relevance to the defense. But whether or not the statistics suggest Hinrichs and Ubl did not terminate Healy because of his age is irrelevant to whether Healy has proffered evidence from which a rational fact-finder could determine that they did.

It is not necessary to consider and weigh the evidence offered by the company because that is the proper function of the finder of fact; on this record, there are issues of material fact for resolution by the proper factfinder. Notwithstanding the Company's proffered explanation that Healy was terminated because of a non-discriminatory reduction in force and his inadequate performance, Healy's evidence would permit a jury reasonably to find that his age was a determining factor in the decision to terminate him and replace him with a younger employee, and that but for his age he would not have been terminated. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984).

Under the ADEA, the ultimate burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. *See, e.g. Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984). The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision.... [P]laintiff's ultimate burden of persuasion includes the requirement to show that the defendant's proffered reason is a pretext for discrimination, *i.e.*, that the proffered reason is merely a fabricated justification for discriminatory conduct. *Burdine*, 450 U.S. at 257, 101 S.Ct. at 1095.... The plaintiff may meet this burden 'either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*' *Id.* at 256, 101 S.Ct. at 1095 (emphasis added).

Chipollini, 814 F.2d at 897, 898.

The Supreme Court of the United States has indicated that it is error to require direct evidence of discriminatory intent. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1983).... This is true in part because age discrimination, like other forms of discrimination, is often subtle.... Thus, by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment.

Chipollini, 814 F.2d at 898, 899.

> In the context of the summary judgment motion, however, the court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons....
>
> *Chipollini*, 814 F.2d at 900 (emphasis supplied).

The *Chipollini* case has been quoted from so extensively because this case is distinguishable from it only by the identities of the parties. There the *in banc* court reversed the district court's grant of summary judgment because, as in this case, the district court erred in weighing competing inferences itself and in resolving disputed facts. Chipollini was informed at the time that his termination was due to a cutback in expenses; his duties and title were later assumed by a younger man who had been promoted to his assistant on Chipollini's recommendation. This happened to Healy. Chipollini had performed his duties in a satisfactory manner and received pay increases and bonuses every year except the last year. This is essentially the record of Healy. In answer to the litigation, the employer asserted Chipollini was terminated not only because of a reduction in force but because of his deficient attitude regarding certain special projects. This is, in every material matter, the script for Healy's employer. The plaintiff in *Chipollini* contradicted the defendant's position on his performance of duties and denied defendant's description of his responsibilities as an "energy warden" by affidavit; Healy did much the same in regard to management post-litigation complaints about his inadequate performance regarding an MBO

assignment.[5] Healy's assertion that the MBO was only 10% of his duties must be accepted for purposes of this motion.

Chipollini merely denied the existence of a medical problem supposedly affecting his work performance by affidavit; he proffered no independent medical evidence. Healy asserted his belief in his fine performance and his experience; this was supported by all his performance evaluations prior to termination and the consequent litigation. It was only six months after termination and the month following Healy's EEOC complaint that the problems with Healy's performance were first articulated. In attempting to distinguish *Chipollini*, the majority, at p. 24, properly accepts all such averments of plaintiff Chipollini and all inferences therefrom as "fact." If the same were done for Healy, the grant of summary judgment for defendant could not be affirmed.

As in *Chipollini*, "[t]he plaintiff challenges the defendant's post-litigation articulation of its intent and the documentary evidence can be viewed as supporting the plaintiff's challenge. Consequently, the issue of pretext turns on [defendant's] credibility and is not appropriate for resolution on a summary judgment motion. The plaintiff is entitled to a jury trial on the merits. *See* 29 U.S.C. § 626(c)(2) (1982)." *Chipollini*, 814 F.2d at 901.

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5. While based on personal familiarity with Management by Objective programs rather than facts of record, Healy's account of his activities in preparing the marketing MBO plan is more consistent with MBO theory and practice than the Ubl and Hinrichs complaints suggest; at the least their statements concerning Healy's supposed deficiencies in this project could have been tested at trial. The conflict in views of the nature of the project and Healy's performance creates an issue of fact. Instead, the company's affidavit rather than Healy's has been accepted in reviewing this motion for summary judgment.

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In *Sorba*, the other summary judgment age discrimination case recently decided by the Court of Appeals, a 54 year old employee was discharged after 27 years of employment. The company claimed that Sorba had performed poorly on his last three jobs, that he had padded jobs, accrued unnecessary overtime expenses, caused morale problems and refused to obey direct orders. The district court granted summary judgment for the employer based on a finding that the employer had articulated valid and non-discriminatory reasons for the discharge, and that Sorba's factual allegations did not present a triable issue of fact.

Sorba admitted that his last three jobs were not successes from the perspective of the company, but claimed that the poor results were due to factors beyond his control. Additionally, there was testimony that Sorba did not cause morale problems and that one of his supervisors knew of no instance when he had unnecessarily extended work. Based on this contradictory evidence, the Court of Appeals held that granting summary judgment was reversible error.

Similarly, Healy has produced evidence by deposition, documents and affidavits which, if credited by the jury, could support an inference of pretext. The presentation of conflicting evidence means that a jury should be given the opportunity to assess the credibility of the employer with respect to the proffered reasons for the discharge. Instead, the majority analyzes the evidence, makes credibility determinations and decides the case in favor of defendant; summary judgment is not a substitute for trial by jury even in an age discrimination reduction in force case.

The majority correctly states, "[t]he difficult issue in the case is whether Healy sufficiently demonstrated that a genuine issue of material fact existed concerning the company's asserted non-discriminatory reasons for

Healy's discharge." In deciding this issue, the majority opinion recites matters of record developed through depositions, affidavits and company documents and refers to moving defendant's self-serving proffers, unchallenged by cross-examination at trial, as "facts." This is so only if the proper fact-finder was the district judge and/or the appellate panel.

Congress expressly intended that age discrimination charges be resolved by juries rather than federal judges; it wanted allegations of age discrimination determined by juries in order to ensure that the rights of plaintiffs would be fully protected. In view of this unequivocably expressed congressional intent, a court should not take age discrimination issues from the jury except in the clearest case. This is not such a case; it is a close case and plaintiff is entitled to have it tried to a jury.

Of course, the standard for summary judgment is the same whether a case would have otherwise been tried by a judge or a jury. But that standard as enunciated by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) has been met here. In *Celotex*, the Supreme Court held that summary judgment is appropriate where the non-moving party has not adequately set forth and defended the elements of the *prima facie* case. *Celotex* does not require that same level of proof when the non-moving party has made out a *prima facie* case but must rebut the showing of the defendant. Similarly, *Anderson* requires only that in evaluating the strength of a *prima facie* case, the same standard be applied as would ultimately be applied by the jury. This case also governs only the sufficiency of the *prima facie* case. Neither *Celotex* nor *Anderson* gives a judge the authority to assess the strength of evidence or the

credibility of witnesses' affidavits once the *prima facie* case has been adequately established.

Here the issue is not whether Healy has established a *prima facie* case; that is conceded. The issue is whether Healy has offered evidence from which a jury might reasonably infer that the reasons for his discharge articulated in response to this *prima facie* case were pretextual. This is the issue on which the legislative history finds that "juries are more likely to be open." This is more not less true where a reduction in force or reorganization is utilized to terminate older workers and difficult issues of pretext are presented.

Where Congress has expressly found "a jury may be more neutral" than a judge, we should not be concerned that every charge of age discrimination arising out of a reduction in force will require a jury trial. We should be concerned that any corporation with an economic incentive for age discrimination will be able to mask it by arranging for a temporary reduction in force and/or reorganization with the assurance that if a charge of age discrimination is made, it can be tried to a court by self-serving post-litigation affidavits of "fact." We should be concerned that our decision places a burden on the older victim of discrimination unintended by Congress, the burden to convince a court he or she will prevail before allowing a jury to decide.

If, as the majority believes, Healy's allegations of age discrimination are unfounded and age was not a substantial factor in his termination, a jury should and would decide against him. For the foregoing reasons, I respectfully dissent and would reverse the judgment of the district court and remand for a trial by jury.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — LETTER—OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JUNE 25, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LETTER—OPINION AND ORDER
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Re: *William J. Healy, Jr. v. New York Life Insurance Co.*
Civil Action No. 86-4141

Counsel:

In 1986, after more than two decades with the defendant company, plaintiff was involuntarily terminated. Plaintiff claims his termination was based, at least in part, on his age and thus violated provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Defendant denies age was a factor in plaintiff's termination and claims the termination was part of a company-wide reduction in force. Defendant concedes certain of plaintiff's responsibilities were assigned to a younger employee, but claims the younger employee was more highly qualified than plaintiff to handle the increased responsibilities

caused by the company reduction in force. Discovery completed, the company now moves for summary judgment dismissing the complaint. At the request of the parties, the matter is decided on the basis of the papers submitted, in accordance with Rule 78 of the Federal Rules of Civil Procedure.

Facts

Plaintiff, William J. Healy, Jr., is a fifty-eight year old New Jersey citizen and resident. Prior to February, 1986, Healy was employed by defendant, New York Life Insurance Company (the "Company"), a New York corporation. Healy's employment with the Company began in 1963 when he was hired as an agent. Healy's employment history with the Company was generally favorable, as evidenced by his steady climb through the ranks of the corporate ladder. By 1979, Healy had achieved the title of Assistant Vice President of the Company's Marketing Department and Coordinator of Communications. (Healy Aff., 6/9/87, ¶ 8; Plaintiff's Ex. C.) In this position, Healy was responsible for, *inter alia,* creating and directing control of communications from the Company's "Home Office" to its "field force" and for supervising communications through the Company's in-house newsletter. (Plaintiff's Ex. C.)

In 1984, Healy was promoted to the position of Marketing Vice President responsible for management training. (Plaintiff's Ex. M.) In this position, Healy was responsible for, *inter alia,* directing "the development of programs and systems to assist in the selection and development of field management coordinating with Company training activities," developing "courses and programs to improve the training skills of the trainers" and developing "programs and systems to evaluate and improve the performance of field management personnel." (*Id.*)

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As of 1984, the Company's Marketing Department was divided into two divisions, one responsible for "management training" and the other for "agent training." As stated, Healy was Marketing Vice President responsible for management training. An individual named Ed Hesse was Marketing Vice President responsible for agent training. Both reported directly to Vice President Walter Ubl, who in turn reported directly to the Marketing Department's Senior Vice President, Jerald R. Hinrichs. (Hinrichs Aff., 5/7/87, ¶ 4.)

During Healy's rise through the ranks, he generally received favorable performance evaluations from his superiors. However, during his tenure as Assistant Vice President and Vice President in the Marketing Department, Healy received several evaluations which indicated certain weaknesses in Healy's performance of his duties. Specifically, in an evaluation dated November 22, 1983, Ubl indicated:

> While Bill has demonstrated a creative approach to many different areas of concern, he tends to become too involved in the current program that other ongoing programs cause him concern. Since this condition is unlikely to change, Bill should work on his ability to be comfortable "juggling" these programs, relying more upon staff for assistance; work to expand versatility.

(Plaintiff's Ex. K.) In another evaluation, dated March 25, 1985, Healy's supervisor indicated "[Healy] must delegate more of the work-load and spend more time in staff development." (Plaintiff's Ex. O.) Finally, in an evaluation dated August 4, 1986 (after Healy's termination), Ubl indicated:

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> Bill too zealously guards his "turf" to the extent subordinates feel little opportunity to expand areas of responsibility. Needs to delegate more—take a bigger view of his job. Must be more future oriented—focuses on the here and now. Broader horizon—must assume more and different responsibilities, a more acquisitive view of what needs to be done as part of the job.

(Plaintiff's Ex. T.) Although these three reviews, as well as others in the record, present a generally favorable evaluation of Healy's performance, they indicate the existence of specific weaknesses as perceived by Healy's immediate superiors.

In August, 1985, Hinrichs delegated to Healy responsibility for preparing the Marketing Department's report for the Company's Management by Objective and Results Program (the "MBO Program"). According to Hinrichs, the MBO Program is designed to force management to analyze its objectives and to develop measurable standards to determine whether the objectives have been achieved. This task was "outside the scope of [Healy's] usual area of management training." (Hinrichs Aff., 5/7/87, ¶ 11.) According to both Hinrichs and Ubl, Healy's performance on the MBO Program was unsatisfactory. They claim Healy failed to demonstrate creativity and initiative in coordinating the Marketing Department's report. They claim Healy simply collected and collated information provided by others and thus caused delays and extra work for Hinrichs and Ubl in connection with production of the report. (*Id.*, ¶¶ 11-12; Ubl Aff., 5/7/86, ¶¶ 3-5.) Healy claims the MBO-Program was not so clearly his individual responsibility, that other people were involved in developing the Program and that he spent no more than ten percent of his time on the Program. Healy maintains he adequately

performed the task as it had been assigned him. (Healy Dep., Galardi Aff., 5/7/87, Ex. 4.)

In late 1985, the Company determined significant cost reductions at the management level would have to be effected if the Company was to remain competitive. The Company decided to cut costs by reducing the salary budget of its "management grades" by twenty percent, reducing the "number of reporting levels of management, thereby pushing decision making down," and increasing the "productivity of the remaining managerial forces." (Hansen Aff., 5/7/87, ¶ 2.) To achieve this twenty percent reduction, the Company first offered management employees the option of electing early retirement. Company departments which had not achieved the twenty percent reduction by January 31, 1988 via early retirement, were then required to make "involuntary terminations" to achieve the reduction. The Company's decision meant that "many jobs and departments had to be restructured and positions or whole layers of management eliminated or consolidated. The remaining jobs obviously had greater responsibilities and heavier work loads, requiring incumbents to work harder and more effectively." (*Id.*, ¶ 4.)

In the Marketing Department, Ed Hesse, the Vice President responsible for agent training, elected early retirement. However, not enough other management employees elected early retirement to reduce the Department's salary budget by twenty percent. Accordingly, after January 31, 1986 Senior Vice President Hinrichs was faced with involuntarily terminating some employees and restructuring the Department to achieve the twenty percent reduction. On February 25, 1986, Hinrichs advised Healy he was being involuntarily terminated, effective immediately.

Hinrichs alleges his decision to terminate Healy was based

in part on his judgment that Healy

> could neither effectively supervise a combined training division nor effectively handle the substantial increase in responsibility that would have been required had he been retained. I found that the plaintiff, rather than taking it upon himself to broaden his responsibilities, would instead try to narrow the scope of his functions. He appeared reluctant to assume expanded responsibilities and encountered problems when faced with coordinating a substantial number of on-going programs. Moreover, he was not good at identifying important future problems or objectives and deciding how to meet them. He also tended to focus only on his own area of responsibility.

(Hinrichs Aff., 5/7/87, ¶ 10.) Hinrichs claims his decision was also partly based on Healy's inadequate performance on the MBO Program. (*Id.*, ¶ 11.) According to Healy, however, Hinrichs advised him the termination was "not based on performance, [but was] simply a salary liability reduction." (Plaintiff's Ex. U, Healy Dep., p. 151.)

After February, 1986, Hinrichs restructured the Marketing Department and reassigned Healy's responsibilities accordingly. Healy's responsibilities over the MBO Program were reassigned to another Marketing Vice President, Richard Carter (age 55). Healy's management training duties were combined with those of Assistant Vice President for Management Training, Paul Russell (age 47), who then reported directly to Vice President Ubl. Russell was also subsequently assigned responsibility over agent training, the job vacated when Vice President Hesse had elected early

retirement. According to Hinrichs, Russell handled these combined jobs better than Healy had performed his own job. (Hinrichs Aff., 5/7/87, ¶¶ 13-14.)

Both Hinrichs and Ubl claim the decision to release Healy and delegate his responsibilities to the younger employee Russell, was based on a business determination that Russell would be more capable of handling the increased responsibilities occasioned by the Company's work force reduction. According to Hinrichs, Russell's promotion

> was in recognition of his consistently superior performance and the high level of management ability he had displayed over a long period of time. Mr. Russell had shown himself to be creative, innovative and willing to take the initiative to broaden the scope of his responsibilities. Moreover, Mr. Russell had had recent, extensive experience in agent training. During his nearly 20 years in Company field offices, he had worked in several positions where he was responsible for agent training.

(*Id.*, ¶ 15.) According to Ubl, Russell

> was an excellent manager with the capability of assuming greatly expanded responsibilities. Mr. Russell had conceived, designed and executed numerous valuable programs and initiatives and was the type of manager who would enlarge his job to ensure that it was done as effectively as possible, and was well able to handle the additional responsibility that he assumed so readily.

(Ubl Aff., 5/7/87, ¶ 7.) Based on their personal observations, therefore, Hinrichs and Ubl claim the decision to terminate Healy and to assign his duties (together with others) to Russell was a legitimate and necessary business determination.

Healy does not contest Russell's abilities. In fact, in a performance review dated April 15, 1985, Healy favorably evaluated Russell's performance, stating "he shows significant initiative and self-starting ability in addressing his responsibilities. He demonstrates the ability to build teamwork and effectively lead people." (Plaintiff's Ex. Q.) Furthermore, at his deposition Healy indicated his judgment of Russell's abilities was "[e]xcellent. I was very proud of him." (Galardi Aff, 5/7/87, Ex. 2 at p. 37.)

Nonetheless, Healy contends that he was just as qualified as Russell to handle the increased responsibilities in the Marketing Department and that the decision to terminate him was ultimately based on age. According to Healy's deposition testimony: "I feel strongly that my termination could not have been based on performance. I know that I could have filled other positions either within or outside of the marketing department, so I feel strongly that the only reason that I was terminated had to do with age. . . . [I]f it was not performance, then it had to be another reason, and I believe it was age." (Galardi Aff., 5/7/87, Ex. 1 at pp. 172, 175.)

On October 22, 1986, Healy filed this action. The complaint alleges

> the conduct of defendant in terminating plaintiff's employment, as aforesaid, and replacing him with a younger person and promoting two younger persons, was contrary to and in violation of the

> provisions of the Age Discrimination and [sic] Employment Act of 1967, as amended, inasmuch as the employment decision of defendant concerning plaintiff was based, in whole or part, on plaintiff's age.

The complaint seeks damages for income and benefits lost since Healy's termination, reinstatement of Healy and restoration of his benefits, liquidated damages, costs and attorney's fees. Discovery having been completed, the Company now moves for summary judgment on the ground Healy has failed to raise a genuine issue of fact about whether his termination was based on age. For the reasons which follow, the motion will be granted.

Discussion

To prevail on a motion for summary judgment, the moving party must establish "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court's task in deciding the motion is to determine whether "there are any genuine factual issues that properly can be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___ , 106 S. Ct. 2505, 2511 (1986). All evidence submitted must be viewed in a light most favorable to the party opposing the motion. *See Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356-57 (1986).

Although the summary judgment hurdle is a difficult one to meet, it is by no means insurmountable. As the Supreme Court has stated, once the party seeking summary judgment has pointed out to the court the absence of a fact issue,

> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'

Matsushita, 106 S. Ct. at 1356 (emphasis in original, citations and footnotes omitted).

The Court elaborated in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2511 (citations omitted): "If the evidence [submitted by a party opposing summary judgment] is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." The Supreme Court went on to note in *Celotex Corp. v. Catrett,* ____ U.S. ____ , 106 S. Ct. 2548, 2553 (1986) (footnote omitted): "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." Thus, once a case has been made in support of summary judgment, the party opposing the motion has the affirmative burden of coming forward with *specific* facts evidencing a need for trial. *See* Fed. R. Civ. P. 56(e).

The ADEA makes it "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C.A. § 623(a)(1). However, the ADEA further provides "[i]t shall not be unlawful

for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . . " 29 U.S.C.A. § 623(f)(1). The Company has moved for dismissal of the case, in part because its decision to terminate Healy was based on "reasonable factors other than age."[1] Given the evidence submitted by the Company in support of its motion, Healy has the burden of "producing either direct evidence of discriminatory intent or evidence from which an inference of discrimination can be drawn." *Equal Employment Opportunity Comm'n v. Hall's Motor Transit Co.*, 789 F.2d 1011, 1015 (3d Cir. 1986). *See also Coley v. Potters Industries, Inc.*, 36 FEP Cases 697, 699 (D.N.J. 1984); *Nash v. Jacqueline Cochran, Inc.*, 548 F. Supp. 676, 680-81 (S.D.N.Y. 1982).

The Company has presented substantial evidence to support its claim Healy was not discharged because of his age. First, the Company has submitted affidavit testimony indicating the Company-wide reduction in force did not have a discriminatory impact on older workers as a class. Both before and after the involuntary termination phase of the reduction, fifty percent of the management level employees affected by the reduction were under the age of forty and fifty percent were over the age of forty. (Hansen Aff., 5/7/87, ¶¶ 10, 11.) This same statistic occurred in the Marketing Department—fifty percent of the Marketing Department's terminees were over forty years old and fifty percent

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1. The Company's motion also asserts Healy has failed to make out a "prima facie" case of age discrimination. Healy's burden on that point is to show "(1) he belongs to a protected class; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987). Drawing inferences from the record favorable to Healy, questions of fact preclude summary judgment on this point.

were under forty. Moreover, of the eight Marketing Department employees involuntarily terminated, only Healy was over fifty. Three others were between forty and forty-four and four were under forty. (*Id.*, ¶ 13.) Although such statistics do not prove conclusively an individual termination was occasioned by factors other than age, they do suggest Healy's termination was not the product of systematic age-based discrimination on the part of the Company. *See Geller v. Markham,* 635 F.2d 1027, 1033-34 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981).

In addition to these statistics, the Company has submitted affidavit testimony and documentary evidence to support its claim that the decision to terminate Healy and give his (and other) responsibilities to Russell was based on a managerial perception that Russell was more highly qualified to handle the postreduction consolidated responsiblities. The affidavit testimony of Ubl and Hinrichs, as well as the excerpts from Healy's performance evaluations (cited above), refer to specific deficiencies in Healy's performance—his inability to effectively delegate tasks, his focus on narrow problems, his difficulty in identifying and addressing future problems, etc.—suggesting Healy might have difficulty handling substantially enhanced responsibilities. In addition, Healy's problems with coordinating the MBO Program also caused Hinrichs and Ubl concern over Healy's ability to work effectively in a position of greater responsibility.

Finally, the Company has produced documentary evidence and affidavit testimony to back up Hinrichs' business judgment favoring Russell over Healy. Hinrichs and Ubl had specific grounds for favoring Russell over Healy for the post-reduction position Healy claims should be his. Healy's own evaluation of Russell, in fact, supports the independent business decision made by Hinrichs. Moreover, although the memorandum in opposition

to this motion asserts "Bill Healy was more experienced and better qualified to peform the job duties given to Paul Russell" (Plaintiff's Brief at p. 17), there are no specific facts in the record to support the claim.[2]

In opposition to the Company's motion, Healy has submitted much evidence to demonstrate he was evaluated favorably throughout his two decades of service to the Company. However, he has submitted no specific facts either to affirmatively support the allegations contained in his complaint or to rebut or undermine the evidence presented by the Company in support of this motion. In essence, Healy presents only his own deposition testimony—in which he surmises his termination was based on age—and points to the fact Russell is younger than he is. Such efforts are simply unavailing to withstand the Company's motion.

Numerous courts have properly granted motions for summary judgment dismissing age discrimination claims in cases such as this in which a plaintiff fails to come forward with more than speculation or opinion that his termination was based on age. *See, e.g., Elliott v. Group Medical & Surgical Service,* 714 F.2d 556, 564 (5th Cir. 1983) ("generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory

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2. The Company has also submitted evidence to rebut the complaint's assertion that two younger persons were promoted to positions for which Healy was qualified. According to the Company, one of the positions was filled by a tax attorney and the other was filled by a person with experience and expertise in marketing research. (Hinrichs Aff., 5/7/87, ¶¶ 16-18.) Healy admitted in deposition that he had no skill in these areas and has submitted nothing in opposition to the Company's motion to suggest he was qualified for these two positions.

reason for his discharge''), *cert. denied,* 467 U.S. 1215 (1984); *Nogar v. Henry F. Teichmann, Inc.,* 640 F. Supp. 365, 373 (W.D. Pa. 1985) (''Plaintiff neither alleged facts tending to show Defendant's non-discriminatory reasons were a pretext for discrimination, nor contradicted those facts stated by Defendant in rebuttal''), *aff'd,* 800 F.2d 1137 (3d Cir. 1986); *Coley v. Potters Industries, Inc.,* 36 FEP Cases at 701 (''[a]ll that [plaintiff] has brought forth in opposing [defendant's summary judgment] motion has been 'unsupported speculation, opinion and surmise—none of which is sufficient to defeat a well grounded motion for summary judgment' ''), *quoting Guitar v. Westinghouse Electric Corp.,* 396 F. Supp. 1042, 1052 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 309 (2d Cir. 1976); *Keller v. Bluemle,* 571 F. Supp. 364, 369 (E.D. Pa. 1983) (''Plaintiff has produced no direct evidence supporting his claim'' and failed to undermine defendant's justifications for termination), *aff'd,* 735 F.2d 1349 (3d Cir. 1984).

See also Schifferly v. Owens-Illinois, Inc., 35 FEP Cases 1011, 1013 (N.D. Ohio 1983) (summary judgment appropriate in ADEA case ''where a plaintiff fails to offer evidence of age discrimination beyond his personal conclusion that age was a factor in the decision to eliminate his job''); *Nash v. Jacqueline Cochran, Inc.,* 548 F. Supp. 676, 680 (S.D.N.Y. 1982) (''there must be some basic evidentiary fact to permit the trier of fact to draw a reasonable and permissible inference of intent to discriminate . . . [plaintiff] has not suggested what additional evidence could be unearthed upon a trial to permit a rational inference that but for his age he would not have been discharged''); *Locke v. Commercial Union Ins. Co.,* 24 FEP Cases 1098, 1099 (W.D. Ky. 1980) (''except for an unsubstantiated allegation that the defendant's reasons for termination were a pretext, the plaintiff asserts that he doesn't know why he was discharged. Therefore, he states that such discharge must have been a result of his age.''), *aff'd,* 676 F.2d

205 (6th Cir. 1982). These cases make clear a plaintiff opposing dismissal of his ADEA claim must come forward with some substance in support of his claims. This Healy has failed to do.

Two recent decisions by the Third Circuit bear mentioning. In both *Sorba v. Pennsylvania Drilling Co., Inc.*, ____ F.2d ____ (3d Cir. June 18, 1987) (Civ. No. 85-819), and *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987), the Third Circuit reversed district court orders granting summary judgment dismissals of ADEA complaints. In each case, the defendant employer had come forward with a proffered business justification to support its termination of the former employee. In each case, the district court found the plaintiff had submitted no direct evidence of age discrimination and had come forward with insufficient circumstantial or indirect evidence from which a jury could infer the plaintiff's dismissal was caused, at least in part, by the plaintiff's age. The Third Circuit reversed in each case, finding that reasonable inferences could be drawn in favor of the plaintiff from indirect evidence in the record.

Critical differences between the record in this case and the record in those cases distinguish this case and compel dismissal of Healy's action. In *Sorba,* the defendant employer contended Sorba's dismissal had been for poor performance, in particular on his last three jobs. The company's president claimed Sorba had "padded jobs, accrued unnecessary overtime, caused morale problems by criticizing the company and refused on occasion to take direct orders." *Sorba,* slip op. at p. 7. However, the deposition testimony of Sorba's two immediate supervisors, upon whom the president claimed to have based his decision to fire Sorba, was equivocal and inconsistent. Specifically, one or both of the supervisors indicated (1) Sorba's performance had not caused the problems associated with the jobs in question, (2) they

did not know whether they had a problem with Sorba's performance, (3) Sorba's alleged detrimental influence on morale was based on hearsay and rumors, and (4) they did not know if Sorba's performance had lost the company money. *Id.* at pp. 8-9. In addition, Sorba submitted several plausible explanations for the problems cited by the company.

In *Chipollini,* the plaintiff had pointed to indirect evidence in the record undercutting the defendant company's proffered explanation for its dismissal of Chipollini. Specifically, Chipollini submitted evidence to suggest (1) he had not performed certain duties poorly, as alleged by the company, (2) a medical problem cited by the company as a reason for his dismissal had in fact not interfered with Chipollini's job performance and (3) he had been evaluated favorably by his immediate supervisors who, in deposition testimony, could identify no specific instances of Chipollini's alleged poor performance. *Chipollini,* 814 F.2d at 900-01. Thus, the Third Circuit reversed the district court's order granting summary judgment in favor of the defendant.

The case at bar is distinguishable from *Sorba* and *Chipollini* in that Healy has pointed to no evidence, direct or indirect, undermining the Company's reasonable explanation for his termination. Specifically, Healy has pointed out no inconsistencies in the testimony of Hinrichs and Ubl explaining their post-reduction assessment of the Company's Marketing Department. Nor has Healy demonstrated their assessment of Russell was pretextual. In sum, all Healy relies upon in opposition to the motion is his belief age played a part in his termination. As the cases cited above indicate, such a basis is unavailing.

Appendix C

Conclusion

Because the record indicates Healy's termination was based upon reasonable factors other than age and because Healy has come forward with no facts to demonstrate age was a factor in his termination, the motion for summary judgment must be granted. The case is dismissed with prejudice.

SO ORDERED, this 25th day of June, 1987.

s/ ALFRED J. LECHNER, JR.,
ALFRED J. LECHNER, JR.,
U.S.D.J.

AJL:ks
cc: Ellen Smith, Deputy Clerk